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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 935

J. B. EDWARDS, RUTH BROUGHER and MONTE PRESTON,

Petitioners,

vs.

JOSEPH DINE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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INDEX.

Summary of Argument.

PAGE

I.

There is no conflict of decisions presented by the record and the Circuit Court of Appeals followed the law of the courts of Illinois 1-13

II.

On appeal the courts will adhere to the theory pursued in the trial court 13-14

Conclusion 14

Table of Cases Cited.

Boddie v. Brewer & Hoffman Brewing Co., 204 Ill. 352, 61 N. E. 1047 ..... 5, 6, 12

Brelesford v. Stoll, 304 Ill. App. 222, 26 N. E. 2d 159 6

Brooks v. Brady, 53 Ill. App. 155 5

Harris v. McDonald, 194 Ill. 75, 62 N. E. 310 ..... 10, 12

Mulcahy v. Vehon, 229 Ill. App. 454 12

St. Paul Fire and Marine Ins. Co. v. Kaufman, 93 F. 2d 156 13

Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867 5

Sternberger v. Wright, 239 Ill. App. 490 5

Suttle v. Finnegan, 86 Ill. App. 423 5

West v. Carter, 129 Ill. 249, 21 N. E. 782 ..... 11, 12

Texts, Statutes and Rules.

Ill. Rev. Stat., 1945, Chap. 38, Secs. 329, 333 ..... 3, 4

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I.

May It Please The Court:

There is no conflict of decisions presented by the record, and the Circuit Court of Appeals followed the law of the courts of Illinois.

The only chaos resulting from the decision is in the minds of the petitioners, arising from their refusal or in-

ability to comprehend the Statute upon which the action is predicated.

The chancellor in his opinion said (R. 24):

> "Both sides agree that the indebtedness which was the consideration for the chattel mortgage and bill of sale here in question was a gambling transaction.
>
> ". . . It is agreed that this case arises out of certain gambling transactions between Dine and Edwards involving betting on various race horses."

The trial court further concluded that the action was brought under the Illinois Statute providing for the cancellation and setting aside of any instrument which has for its consideraton the reimbursement or repayment of any money lent or advanced for use in betting on race horses.

In his opinion the chancellor said (R. 23):

> "Plaintiff seeks to have set aside a chattel mortgage, a bill of sale and an option to repurchase three race horses, Valdina Lamar, First Command and Colonel Al, on the ground that they were executed and delivered as a result of certain gambling transactions, and under the statute of Illinois are therefore void and of no effect. In count 1. of his complaint plaintiff sets out that his action is brought under sections 329 and 333, chapter 38 (Criminal Code), Ill. Rev. Stat., 1945, which provide: '(Section 329) All . . . agreements, . . . mortgages, or . . . conveyances . . . where the whole or any part of the consideration thereof shall be for any money . . . won by any gaming or . . . wager or bet upon any race, . . . or for the reimbursing or paying any money or property knowingly lent or advanced . . . to any person . . . so gaming or betting . . . shall be void and of no effect.' '(Section 333) All . . . mortgages, . . . agreements, . . . or conveyances, given, granted, drawn or executed, contrary to

> the provisions of this Act, may be set aside and vacated by any court of equity, upon bill filed for that purpose by the person so granting, giving, entering into, or executing the same' . . ."

The respondent prayed an appeal from the judgment dismissing the case (R. 27). No error was assigned nor exception taken by petitioners to the order of dismissal and judgment.

It is evident from the record that the matter was presented squarely to the chancellor on the proposition that the indebtedness which was the consideration for the chattle mortgage and bill of sale was a gambling transaction and void under Section 329 of Chapter 38, Illinois Revised Statutes, 1945, and that the cause of action was further predicated upon Section 333, Chapter 38, Illinois Revised Statutes, 1945, providing for the cancellation and setting aside by bill in equity of any instrument, conveyance, etc., which has for its consideration any money won by gaming or wager or bet upon any race, *or for the reimbursing or paying* of any money knowingly lent or advanced for use in betting on horse races.

The chancellor in spite of these conclusions (R.. 23) dismissed the cause on grounds of "public policy" or "public morals" and in conformity with the fundamental principles of equity (R. 25, 26), thus giving support to the grounds advanced by petitioners in their motion to dismiss (R. 22).

The petitioners in their petition for rehearing (R. 45) at no time asserted that the Circuit Court of Appeals had decided the case according to wrong principles or in conflict with cited authorities (R. 55). They were "in accord

with most of the propositions advanced by respondents, except that *Pearce* v. *Rice* is far from being in point when applied to the case at bar" (R. 56).

The history of the decisions of the reviewing courts of Illinois as advanced in the supporting brief of the petition for certiorari (pp. 13-18) is grossly misleading, due to the confusion of the petitioners and their apparent inability to properly analyze these cases.

Sections 329 and 333, chapter 38, Illinois Rev. Stat., 1945, were first enacted in 1874. They have from time to time in the reclassification of the Statutes borne different numbers, but the text has remained the same. This particular group of Statutes under different sections prohibits the renting of premises for gambling purposes, gambling in grain futures, gambling at dice, gaming, betting on horses and (Sec. 329) declares all promises, notes, covenants, conveyances, etc. drawn or entered into where the whole or any part of the consideration shall be money won at gaming or for the reimbursing or paying any money knowingly lent void and of no effect. This Section 329 is one of the sections under which the complaint was filed (R. 2).

Section 333 of Chapter 38 provides the method for setting aside judgments, mortgages, covenants and agreements given contrary to the provisions of the Act—the method being by bill in chancery filled for that purpose by the person so granting or entering into such agreement. For convenience, we set out Section 333:

> "All judgments, mortgages, assurances, bonds, bills, specialties, promises, covenants, agreements, ments, and other acts, deeds, securities, or conveyances, given, granted, drawn or executed, contrary to

> the provisions of this Act, may be set aside and vacated by any court of equity, upon bill filed for that purpose, by the person so granting, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; or if a judgment the same may be set aside on motion of any person aforesaid, on due notice thereof given."

Taking the cases in the order cited by petitioners, we will show their impertinence to the case at bar.

Shaffner v. *Pinchback,* 133 Ill. 410, was a suit at law between persons engaged in a gambling transaction. It was not a suit brought under the Statute to set aside conveyances and has no application here.

Boddie v. *Brewer & Hoffman Brewing Co.,* 204 Ill. 352, was a suit instituted under Sections 329 and 333 of Chapter 38, Ill. Rev. Stat., 1945, and is strongly adverse to the petitioners. We shall analyze this case later.

Brooks v. *Brady,* 53 Ill. App. 155, one of the "overlooked cases" cited by petitioners (R. 46) was a suit at law on a note. Defense was interposed that the consideration was a gambling transaction. Held that it was not a gambling transaction and not within the inhibiton of the Statute. This was not a suit in equity brought under the Statute for the purpose of setting aside a conveyance, the consideration for which was a gambling transaction.

Suttle v. *Finnegan,* 86 Ill. App. 423, another "overlooked case," was likewise a suit at law on a note. The Statutes invoked in the case at bar were not in issue.

Sternberger v. *Wright,* 238 Ill. App. 490, the third of the "overlooked" cases was, like its two predecessors, a suit at law on a note.

Apart from the fundamental difference that none of the above cases were suits in equity brought under the Statute, with the exception of *Boddie* v. *Brewer & Hoffman Brewery Co.*, there is the salient difference that in each of these cases there was a dispute as to whether these transactions between the parties were gambling transactions, whereas in the case at bar the *petitioners admit the transactions were gambling and the consideration for the chattel mortgage and bill of sale was based on a gambling transaction* (R. 24).

Brelesford v. *Stoll*, 304 Ill. App. 222, was a suit in equity for dissolution of a partnership and an accounting. The business of the partnership was that of making gambling machines prohibited by law. Upon general equitable principles the action was dismissed.

It is difficult to understand the petitioners' persistent refusal to become cognizant of the fact that the case at bar is taken out of the general equitable rules of law by the Statute and that the respondent is proceeding solely and exclusively under Sections 329 and 333, Chap. 38, Ill. Rev. Stat., 1945.

Boddie v. *Brewer & Hoffman Brewing Co.*, 204 Ill. 352, distinctly gives the Illinois courts' interpretation of the law involved in the instant case and is in complete harmony with the decision of the Circuit Court of Appeals here. The facts in the *Boddie* case are: Boddie sued the Brewing Company and obtained judgments in two separate suits at law in the Superior Court of Illinois, one in March, 1897, and the other in March, 1899. The judgments were for installments of rent due upon a lease executed by Boddie to the Brewing Company and others. The Brewing Com-

pany defended these suits and the judgments were based upon the verdict of a jury after trial. The Illinois Appellate and Supreme Courts affirmed these judgments. The defenses interposed to these suits *were other than that the premises* were leased for the purpose of carrying on gambling. The Brewing Company then filed a bill in equity under the Illinois Statute, Sections 127 and 135 (Section 135 then being Section 333 now) to vacate these judgments. The Illinois Supreme Court in this case went so far in upholding the right of the Brewing Company to come into equity under the Statute for the purpose of setting aside judgments, conveyances, etc., that it held the failure of the Brewing Company to set up in its defense of the two cases at law that the lease was void because the premises were rented for gambling purposes did not preclude it from asserting this for the first time in the suit in equity under the Statute. We quote from the decision (p. 354):

> "As the defense could have been interposed in the actions at law in which the judgments sought to be set aside were rendered, did the fact that appellee company knew the premises were leased for a gambling house make it necessary that it should plead that fact when sued for rent upon the lease, or could it appear and interpose other defenses to the actions, and after judgments had been rendered against it, raise the question that the premises had been leased for use as a gambling house by bill in equity to set aside the judgments. We think under the authority of *Mallett* v. *Butcher*, 41 Ill. 382, *Lucas* v. *Nichols*, 66 Ill. 41, *West* v. *Carter*, 129 Ill. 249, and *Harris* v. *McDonald*, 194 Ill. 75, it could. . . . It was the intention of the legislature to make all judgments, like all contracts on which they were founded, absolutely void and of no vitality, and they cannot be vitalized by the action of any court."

And at page 355 the Court said:

> "In the cases above referred to the general doctrine is recognized that where a party has a defense to an action at law and he fails to make it or fails to bring forward his entire defense, a court of equity will not relieve him, but it is said in cases falling within the statute passed for the purpose of prohibiting gambling are by force of the Section 135 (now 333) taken out of the general rule."

Pearce v. *Rice*, 142 U. S. 28, is claimed by the petitioners as having no bearing on the issues in the case at bar. In order to demonstrate clearly the applicability of *Pearce* v. *Rice*, 142 U. S. 28, and to show its remarkable similarity to the case at bar, we wish to quote from the opinion by Mr. Justice Harlan (pp. 34-37):

> "The statute of Illinois referred to—being the part of the Criminal Code of that State, relating to 'Gambling and Gambling Contracts'—provides: . . .
>
> " 'Sec. 131. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into, or executed by any person whatsoever, where the whole or any part of the consideration thereof, shall be for any money, property or other valuable thing, won by any . . . wager or bet upon any . . . chance, . . . or unknown or contingent event whatever, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such . . . bet, to any person or persons so gambling or betting, . . . shall be void and of no effect.
>
> " 'Sec. 135. All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements and other acts, deeds, securities or conveyances, given, granted, drawn or executed, contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that

purpose, by the person so granting, giving, entering into or executing the same' . . .

"The (defendant) invokes . . . the rule recognized in the courts of the United States, that equity will not, at the instance of one against whom a judgment at law has been rendered restrain the operation or effect of that judgment, unless there be equitable circumstances justifying its interference. . . .

"The courts of Illinois have not regarded these rules as strictly applicable in cases under the law relating to gambling and gambling contracts. In *Mallett* v. *Butcher*, 41 Illinois 382, 385, the Supreme Court of that State, construing the statute in question held that all contracts having their origin in gaming were void, not voidable only, and that it was entirely immaterial when or how the fact was disclosed to the court; consequently, a suit in equity would lie to set aside a judgment at law on a note given for money lost in gaming with cards . . . The same question arose in *West* v. *Carter*, 129 Illinois, 249, 254 . . . The judgments, promises and instruments therein specified being void and of no effect, it is not,' said the court, 'in the power of the party to whom made, granted, given or executed, or in whose interests they are drawn or entered into, to give the contract validity. Nor can the court, at the instance of such party, any more than it could have by the confession or consent of the defendant, vitalize the contract, and by its judgment defeat the effectiveness of the proceeding in equity authorized by the . . . statute to set aside the void contract . . . The rule in equity that courts of chancery will not take jurisdiction when there is an adequate defence or remedy at law, must yield to the requirements of this statute, that relief may be granted in a court of equity to vacate and set aside judgments and contracts obtained in violation of this provision."

We think it plain from petitioner's comment on the *Pearce* case that they not only misapprehend the purport

of *Pearce* v. *Rice,* but also of the case at bar. They are in a whirlpool created by their belief on one hand that it is a cause based on general equitable proceedings to which the doctrine of *pari delicto* will apply, and, on the other hand, that it is a suit at law to which they can interpose the defense of illegality by reason of gambling. Nowhere in the entire record do they perceive that the case at bar is a suit in equity brought under a specific Illinois Statute to set aside a conveyance, the consideration for which is gambling. Nor do they comprehend that the record clearly shows that they admitted that the transactions were gambling transactions. It is further evident that they are unable to discern that the Illinois Courts and the United States Supreme Court have upheld the provisions of these Statutes in passing upon contentions analagous to those made by the respondent in the instant case.

Harris v. *McDonald,* 194 Ill. 75, was a bill in equity filed under the Statutes relied on in the case at bar to set aside a judgment. Harris proceeded against McDonald on the latter's guaranty for the payment of rent on a lease between Harris and one Hogan, and to set aside and cancel a certificate of sale of McDonald's premises, which had been sold under *fieri facies* execution issued on the judgment and for an injunction restraining Harris from bringing any more suits on the guaranty. The relief prayed for was granted and appeals to the Illinois Appellate and Illinois Supreme Courts were affirmed.

The Court in *Harris* v. *McDonald,* 194 Ill. 75, said (p. 79):

> "And it follows that if the contract of guarantee of the appellee (McDonald) and the judgment thereon rendered against him fall within the things enumerated in Section 135 (now Section 333) as 'all judgments,

> mortgages, assurances, bonds, notes, specialties, promises, covenants, agreements, ands other acts, deeds, securities or conveyances, given, drawn or executed contrary to the provisions of this act' (the act in question), such guarantee may be set aside in equity. . . . It cannot be doubted then that the lease and the covenant therein to pay rent were contrary to the provisions of Section 127 and that it and the judgment would on sufficient proof be set aside in equity under Section 135 (now Section 333)."

West v. *Carter*, 129 Ill. 249, was a case brought under the same sections of the Illinois Statutes as the case at bar. The relief prayed for was granted and affirmed by the Appellate Court. On appeal to the Supreme Court the case was reversed only because Carter was not an interested person within the purview of the Statutes. It has not been contended by the petitioners that Dine is not such an interested person. The Supreme Court of Illinois states (p. 253):

> "We should perhaps notice the contention of counsel for appellant that Sections 131 and 135 can have no application unless rendered by confession. . . . We are not prepared to so restrict the operation of this statute. By Section 131 all promises . . . executed . . . where the consideration thereof shall be for money won by any gaming . . . or wager or bet upon any horse race, etc., are made not only voidable but absolutely voidable and of no effect. Being void it is not in the power of the party to whom made . . . to give them vitality. Nor can the court at the instance of such party any more than it could by the confession or consent of the defendant vitalize the contract and defeat the effectiveness of the proceedings in equity authorized by the 135th section (now 333) of the statute to set aside the void contract. . . . It was the intention of the legislature to make all judgments like the contracts upon which they are founded absolutely void—of no vitality."

In *Mulcahy* v. *Vehon*, 229 Ill. App. 454, it was held that this language was not dictum, page 461.

It is evident that the courts of Illinois with monotonous repetition, even in cases relied upon by the respondents, assert that gambling contracts are void and the Illinois legislature has provided that by suit in equity these contracts may be set aside. With the same monotonous repetition they state that these contracts can not be vitalized. To disturb the opinion of the Circuit Court of Appeals would be giving vitality to the chattel mortgage and the bill of sale.

Mulcahy v. *Vehon*, 229 Ill. App. 454, seems to the petitioners a further case that has no bearing on the issues in the case at bar. It is obvious that petitioners have failed to read this case. Counsel for the appellant in the *Mulcahy* case were somewhat less confused than counsel for the petitioners here. The court in its decision in the *Mulcahy* case interprets *West* v. *Carter*, 129 Ill. 249, *Harris* v. *McDonald*, 194 Ill. 75, *Boddie* v. *Brewer & Hoffman Brewing Co.*, 204 Ill. 352, and *Pearce* v. *Rice*, 142 U. S. 28, to the same effect that the Circuit Court of Appeals does in the instant case. We submit that *Mulcahy* v. *Vehon*, 229 Ill. 454, is a rather complete analysis of those cases which petitioners have been unable to decipher, and it is positive argument in favor of denying their petition for certiorari.

Manifestly, the petitioners have confused the special statutory proceeding commenced by the respondents in the case at bar, with a suit which invokes the inherent equitable jurisdiction of a court of chancery and with a suit at law to enforce payment of a note the consideration for which was based upon gambling transactions.

It is difficult to conceive of a sincere mistake being made as to the character of the action brought by the respondent. In his complaint the respondent clearly and definitely set forth the Illinois Statutes under which he invoked the court's jurisdiction.

In giving a party to a gambling transaction the right to go into a court of equity and by decree have set aside a contract, note or mortgage arising out of a gambling transaction, the Illinois legislature made clear its intent to create an extraordinary remedy unknown to courts of equity and which would otherwise be barred by the limitations on chancery jurisdiction. To permit invocation of general equitable doctrines in bar of a proceeding expressly granted by Statute would nullify the legislative enactment. A right of action given by the legislature may not be destroyed by legal reasoning or equitable philosophizing. Neither will usurpation of the legislative province by the judiciary be tolerated.

The Circuit Court of Appeals did rely on and apply the law of the Illinois Courts and the United States Supreme Court to the case at bar. It did not construe the Statutes in question for itself in conflict with the established law, but, on the contrary, followed the legislative intent and the decisions of the Illinois and United States Supreme Courts.

II.

On appeal the Courts will adhere to the theory pursued in the trial court.

In the district court in support of the motion to dismiss the petitioners asserted that a court of equity will not adjust disputes arising out of gambling transactions (opinion of the Circuit Court of Appeals, page 24 of Petition

for Certiorari), and admitted the consideration for the chattel mortgage and bill of sale was based on a gambling transaction (R. 24).

In the Circuit Court of Appeals the petitioners reiterated the arguments advanced in the trial court.

It is well settled that the court on appeal will adhere to the theory of the case pursued in the trial court and will not consider contentions resting upon a different theory. *St. Paul Fire and Marine IIns. Co.* v. *Kaufman,* 93 F. 2nd 156.

Petitioners now seek to cast aside this theory in their anxiety to present a case meriting the consideration of this Court. They say in the petition that "it must be remembered that this is not a case where the whole or any part of the consideration was for money won by gaming."

We submit that they can not now change their theory. They directly and positively conceded in the trial court and the Court of Appeals that it was a gambling transaction.

Conclusion.

We respectfully submit the petition sets forth no proper grounds for issuance of the writ of certiorari, that the judgment of reversal and remandment by the Circuit Court of Appeals is right, and that the petition for certiorari should be denied.

Respectfully submitted,

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